IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDICES

LEONARD L. SCHEINHOLTZ
HENRY J. WALLACE, JR.
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner,
GATEWAY COAL COMPANY

Of Counsel:
DANIEL R. MINNICK

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

TABLE OF CITATIONS

CASES

Other Authorities.

STATUTES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ....

GATEWAY COAL COMPANY,
Petitioner
v.
UNITED MINE WORKERS OF AMERICA et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gateway Coal Company, Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 18, 1972, rehearing denied August 31, 1972, in which the court reversed the District Court and vacated a preliminary injunction enjoining respondents[1] from continuing a work stoppage over an alleged safety dispute and ordering arbitration of the underlying dispute.

1. Respondents are individually designated in the caption of the opinion of the Court of Appeals set forth in Appendix C, *infra*, p. 11a.

Jurisdiction.

OPINIONS BELOW

The temporary restraining order issued by the District Court for the Western District of Pennsylvania on June 18, 1972, is unreported (Appendix A, *infra,* pp. 1a-4a) as is the memorandum and order issued by the District Court on June 28, 1971, converting the temporary restraining order into a preliminary injunction (Appendix B, *infra,* pp. 5a-10a). The opinion of the United States Court of Appeals for the Third Circuit is reported at ____ F.2d ____, and was filed on July 18, 1972 (Appendix C, *infra,* pp. 12a-24a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1972 (Appendix D, *infra,* pp. 25a-26a). A petition for rehearing, timely filed, was denied on August 30, 1972 (Appendix E, *infra,* pp. 26a-27a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was by virtue of 29 U.S.C. §185.

QUESTIONS PRESENTED

1. Does the strong federal policy favoring arbitration of industrial disputes apply to safety disputes or is there a presumption that safety disputes are not arbitrable?

2. Does a federal court have authority under *Boys Markets v. Retail Clerks,* 398 U.S. 235 (1970), to enjoin a strike over a safety dispute and order arbitration of the underlying dispute or is the *Boys Markets* decision limited to economic disputes not involving safety?

3. Where a union relies upon the "abnormally dangerous conditions" provision of Section 502 of the Labor-Management Relations Act as justification for a work stoppage, must it present ascertainable, objective evidence to support its contention that its members have a good faith belief that an abnormally dangerous condition exists or is it sufficient for the union merely to present evidence that the employees believe such a condition exists?

STATUTES INVOLVED

This case involves the interpretation and application of Sections 203(d), 301(a) and 502 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136 et seq. 29 U.S.C. §141 et seq. (hereinafter "the Act). They are printed in Appendix F, *infra*, pp. 27a-28a.

STATEMENT OF THE CASE

On June 16, 1971, petitioner, Gateway Coal Company ("Gateway"), brought this action under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, to compel arbitration of an alleged safety dispute and to enjoin a strike in furtherance of that dispute.

The dispute giving rise to the work stoppage involved a claim by the union and its members that the Gateway mine was rendered unsafe by the presence of three third-shift foremen who were accused of having failed to record a reduction in air flow volume, which resulted from the partial blockage of an intake airway, in connection with a preshift examination of the mine.

On April 15, 1971, shortly before the daylight shift was scheduled to begin work in the mine, it was discovered that the flow of air through the work area was 11,000 cubic feet per minute as compared with a normal air flow of 28,000 cubic feet per minute (R.[2] 15, 18, 59, 64-67). Although the air flow was reduced, the work area still had an adequate supply of air, which was substantially above the federal and state ventilation requirements (R. 14-15, 55, 64-67).

---

2. Two almost identical Appendices (except for page numbers) were filed in the Court of Appeals, one by the United Mine Workers and its District No. 4, and the other, by Local Union No. 6330. For the convenience of the Court, all page references in this petition will be to the Appendix filed by Local No. 6330 and will be designated as "R. . . . .".

The problem was traced to a partial blockage of an intake airway which is believed to have occurred at about 4:30 a.m. on April 15 (R. 14, 53, 72). Repairs were made immediately and normal air flow was restored (R. 20, 145-146).

Work proceeded without incident until the following morning when the company refused the union's request for reporting pay for April 15 for those miners who had ignored the company's instruction that they stand by until repairs were completed (R. 20). The company's offer to arbitrate the reporting pay dispute was rejected and the miners struck (R. 21-22).

On April 17, pursuant to a request by the union made after the strike had started over the reporting pay issue, federal and state inspectors visited the mine to determine the adequacy of the repairs (R. 22-23, 152). In the course of this investigation, it was discovered that three third-shift foremen had failed to record any reduction in air volume in connection with the pre-shift examination which each conducted between 5 a.m. and 8 a.m. (R. 71, 54). The company suspended two of the foremen pending its own investigation of the matter (R. 22, 54-55, 83-85). It decided against suspending the third foreman because he had reported the trouble (R. 22, 54-55).

On April 18, the Gateway miners attended a special meeting at which they voted not to return to work unless all three foremen were suspended (R. 141-142, 157). When notified of the union's position, the company reluctantly agreed to suspend the third foreman who had reported the trouble, but advised the union that the foremen would be returned to work when their certifica-

tion status was clarified by the Commonwealth of Pennsylvania (R. 28, 99-102). The company was aware that consideration was being given by the state to the initiation of decertification proceedings, which would mean that the foremen could no longer serve as supervisors in the mine (R. 25, 89-90).

The Gateway miners returned to work on April 19 (R. 24, 112).

Subsequently, a criminal misdemeanor charge was filed against the foremen for falsifying mine records (R. 56, 52). However, after investigation the state decided against seeking to decertify the foremen. On May 29, the company received a copy of a letter addressed to the union from the Pennsylvania Department of Environmental Resources advising the union that in view of the satisfactory record and good performance of the foremen and the pending criminal action, the state had decided that no action should be taken to decertify the foremen and that the "company is at liberty to return the three (3) assistant foremen to work if it so desires" (R. 212).

Upon receipt of this letter, the company reinstated two of the foremen (one had retired while on suspension) and the union struck again on June 1 (R. 26-30, 113-114). The company's offer to arbitrate the question as to whether the mine was rendered unsafe by the presence of the two foremen in the mine was rejected by the union (P. Ex. 6; R. 33-34, 217-218).

At the time material to this proceeding, Gateway and the union were parties to the National Bituminous Coal Wage Agreement of 1968 (P. Ex. 1; R. 185-211).

The "Settlement of Local and District Disputes" provision of that agreement contains a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final, and binding arbitration of "differences between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and ". . . differences . . . about matters not specifically mentioned in [the] agreement . . ." and ". . . any local trouble of any kind [arising] at the mine . . ." (R. 199).

The District Court found that the dispute giving rise to the work stoppage was arbitrable under the terms of the labor agreement and that the strike violated the agreement. On the basis of *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), it ordered arbitration of the dispute but directed that the foremen be suspended pending the outcome of the arbitration, and enjoined the Gateway employees from continuing their work stoppage (Appendix A, *infra*, pp. 3a-4a; Appendix B, *infra*, p. 10a). Thereafter, the impartial umpire ruled that the dispute was arbitrable even though it involved a safety claim; that the position of the Gateway employees in refusing to work with the two foremen was unfounded; that their presence in the mine did not render the mine unsafe; and that the union safety committee had acted arbitrarily and capriciously in causing the work stoppage (Appendix G, *infra*, pp. 29a-51a).

The Court of Appeals for the Third Circuit, in a two-to-one decision, reversed the judgment of the District Court and vacated the preliminary injunction.

The Court of Appeals concluded that the strike at the Gateway mine was not enjoinable because, in its

view, the dispute giving rise to the work stoppage was not arbitrable. Despite the extremely broad arbitration clause, the Court of Appeals held that the dispute as to whether the mine would be rendered unsafe by the continued presence of the foremen was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (Appendix C, p. 16a).

The Court of Appeals refused to apply the strong federal policy favoring arbitration, a view which it said was supported by Section 502 of the Labor-Management Relations Act of 1947. Safety disputes, it concluded, are "*sui generis*", and public policy "should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (Appendix C, pp. 16a, 18a).

The Court of Appeals also held that this Court's decision in *Boys Markets, supra,* was inapplicable because it involved "an economic dispute, not involving safety" (Appendix C, p. 18a, n. 1).

The Court of Appeals concluded that, under Section 502, the miners themselves are entitled to make a subjective determination as to what constitutes a safety hazard and that it is unnecessary for the union to prove by objective evidence that an abnormally dangerous condition does in fact exist (Appendix C, pp. 14a, 17a-18a).

Judge Rosenn, dissenting, expressed serious reservations that a good faith safety dispute underlay the strike enjoined by the District Court, but noted that "[w]hatever the probative weight of the evidence the

union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration" (Appendix C, p. 21a). Judge Rosenn indicated particular concern with the majority's failure to require ascertainable, objective evidence that an abnormally dangerous condition for work exists, stating that "[a]cceptance of anything less by a court would be an abdication of its judicial role" (Appendix C, p. 22a).

Judge Rosenn found that the alleged dispute fell squarely within the language of the arbitration clause of the contract and was not excluded from arbitration by any other provision, and that for a court to order the matter to arbitration was harmonious with the policies underlying the Act and would provide for a final resolution of the dispute not inconsistent with Section 502 (Appendix C, pp. 23a-24a).

Finally, Judge Rosenn pointed out that "[v]acating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971" (Appendix C, p. 24a).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Contrary to Federal Labor Policy and in Direct Conflict With Decisions of This Court.

1. The decision of the court below that the federal labor policy favoring arbitration of industrial disputes is inapplicable to safety disputes is contrary to Section 203(d) of the Labor-Management Relations Act of 1947 and is in direct conflict with the applicable decisions of this Court interpreting and applying the federal labor policy set forth in this Section of the Act.

Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), this Court, after reviewing the federal labor policy favoring arbitration of grievance disputes, held that there is a presumption that such disputes are arbitrable, saying at pages 582-583:

> ". . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Contrary to the clear dictates of *Warrior & Gulf*, the court below ruled that the safety dispute in question was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor con-

tract that the parties shall submit mine safety disputes to arbitration . . ." (Appendix C, p. 16a). Thus, the court below established a novel presumption of nonarbitrability for disputes involving safety. In doing so, the court below also ignored this Court's holding in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, that the federal labor policy set forth in Section 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

It would be difficult to write a broader arbitration clause than the one involved in this case. It not only provides for arbitration of differences as to the "meaning and application of the provision of [the] agreement" but for arbitration of "differences . . . about matters not specifically mentioned in [the] agreement" as well as "any local trouble of any kind [arising] at the mine" (R. 199). Moreover, in another section of the contract, the parties specifically agreed that all unresolved disputes, unless national in character, would be settled "by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement . . ." (R. 207). Thus, the decision of the court below failed to give "full play" to the means the parties chose for the resolution of the alleged safety dispute.

The court below claimed to find justification for its presumption of nonarbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947. It erroneously reasoned that "the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of

safety disputes by arbitration" (Appendix C, p. 18a). However, Section 502 does not specifically nor by necessary implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view of the court below that safety disputes are *"sui generis"* and are to be treated differently than any other kind of grievance disputes.[3] (Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948) 29, 156, 290, 436, 573, 895.) In *Steelworkers v. American Mfg. Co., supra,* this Court said (363 U.S. at 567):

> "Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement." (Emphasis added)

Arbitration of safety claims is clearly compatible with Section 502, which must be read *in pari materia,* not only with Section 301 but with Section 203(d), since all three sections are part of the same chapter of the Labor-Management Relations Act of 1947. As Judge Rosenn aptly observed in his dissenting opinion:

> ". . . section [502] requires a third party, a court, to determine the reasonableness of the union's be-

---

3. It is apparent that the court below was under the misapprehension that safety disputes are rarely, if ever, arbitrated. Actually, safety disputes are arbitrated with such frequency that *Labor Arbitration Reports,* published by the Bureau of National Affairs, has a specific key number for arbitration cases dealing with safety and health disputes (§124.70) and another key number (§118.658) at which cases dealing with discharge or discipline for refusal to accept work assignments because of alleged safety or health hazards are collected.

lief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision." (Appendix C, p. 23a)

Within the last three years, due to the growing concern over industrial safety and health, Congress has enacted the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §801 *et seq.* and the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §651 *et seq.*[4] These statutes contemplate a joint employer-employee effort to reduce health and safety hazards, and to this end many collective bargaining agreements incorporate their terms by reference. The decision of the court below that safety disputes are not subject to arbitration prevents the parties from utilizing this means of peacefully resolving any disputes which may arise as to the interpretation and application of these statutes, thereby nullifying the intent of Congress.

2. The decision of the court below, by failing to give binding effect to the umpire's decision on the safety issue, is also in direct conflict with the holding of this Court in *Steelworkers v. Enterprise Corp.*, 363

---

4. It is estimated that the Occupational Safety and Health Act of 1970 alone applies to 4,100,000 business establishments with over 57,000,000 employees. Bureau of National Affairs, *The Job Safety and Health Act of 1970* (1971).

U.S. 593 (1960), that "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

In the present case, an impartial arbitrator, with extensive experience in mining, determined that the dispute was arbitrable and that there was no safety hazard created by the continued presence of the foremen in the mine (Appendix G, p. 51a). Nevertheless, the court below concluded that the Gateway miners should not be required to accept the arbitrator's resolution of the safety dispute even though the labor agreement provides that "the decision of the umpire shall be final" (R. 199). It paid no heed to the caution expressed by this Court in *Steelworkers v. Enterprise Corp., supra* at 599, that

> ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his."

3. The decision of the court below is also in direct conflict with the decision of this Court in *Boys Markets, Inc. v. Retail Clerks Union,* 398 U. S. 235 (1970), as well as *Teamster Local 174 v. Lucas Flour Co.,* 369 U. S. 95 (1962).

In the *Lucas Flour* case, *supra,* this Court held that where, as here, there is a strike over a dispute which is subject to resolution under the arbitration clause of a labor agreement, the work stoppage constitutes a viola-

tion of the collective bargaining agreement even when the agreement does not contain an explicit no-strike clause.[5]

In the *Boys Markets* case, *supra,* this Court expressly overruled its earlier decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), and held that a federal court has jurisdiction under Section 301 of the Labor-Management Relations Act of 1947 to enjoin a strike over an arbitrable grievance. It did so because *Sinclair* stood as a significant departure from this Court's "otherwise consistent emphasis upon the congressional policy to promote peaceful settlement of labor disputes through arbitration . . ." (398 U.S. at 241). Viewed in this light, there simply is no basis for the conclusion of the court below that *Boys Markets* is limited in its application to "an economic dispute, not involving safety" (Appendix C, p. 18a, n. 1).

The decision of the court below that a strike over a safety dispute is not enjoinable will have a devastating impact on the stability of labor relations. Dissenting Judge Rosenn recognized quite clearly the potential unsettling effect of the majority opinion when he said:

---

5. Despite the absence of an express no-strike clause in the National Bituminous Coal Wage Agreement, since *Lucas Flour* lower courts have consistently implied an agreement not to strike over arbitrable disputes: *Blue Diamond Coal Co. v. Mine Workers,* 436 F.2d 551 (6th Cir. 1970); *Old Ben Coal Corp. v. Mine Workers,* 457 F.2d 2845 (7th Cir. 1972); *United States Steel Corporation v. United Mine Workers of America,* 320 F. Supp. 743, 746 (W.D.Pa. 1970); *United States Steel Corporation v. United Mine Workers,* 77 LRRM 3134 (E.D.Ky. 1971).

". . . If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes."

(Appendix C, p. 22a)

For this reason, the present case is of the utmost importance and concern, not only to Gateway and other signatories to the National Bituminous Coal Wage Agreement, but to all other employers and labor unions. While most labor agreements now contain a provision for arbitration of grievances, relatively few contain a specific provision making safety disputes arbitrable[6] and even in that event, the decision below raises serious

---

6. This case arises under and was decided on the basis of the 1968 National Bituminous Coal Wage Agreement. The fact that in 1971 the agreement was revised to provide a special grievance-arbitration procedure for resolution of health and safety disputes does not diminish the importance of this case or its appropriateness for review.

doubt as to the employer's right to injunctive relief against wildcat safety strikes.[7]

Unless a federal court can enjoin a work stoppage over an alleged safety dispute and order arbitration of the underlying dispute, as the District Court did in this case on the basis of *Boys Markets,* how are such disputes to be resolved? The answer of the court below—that they are to be settled on the picket line—is hardly in keeping with the congressional policy enunciated in Section 203(d) and is a result neither contemplated by Section 301 nor required by Section 502.

---

7. The court below in the footnote in which it held *Boys Markets* to be inapplicable to safety disputes went on to state:

"It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable." (Appendix C, p. 18a, n.1)

Hanna Mining Co. v. Steelworkers, — F.2d —, 80 LRRM 3268 (8th Cir. 1972), while distinguishable on its facts, clearly conflicts in principle with the *Gateway* decision on this issue.

B. The Case Raises a Vital Question Concerning the Interpretation of Section 502 of the Labor-Management Relations Act of 1947 Which Has Not Been, but Should Be, Decided by This Court.

Section 502 of the Labor-Management Relations Act of 1947 provides that ". . . the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act."

Until the present case, as Judge Rosenn pointed out in his dissent, the decisions interpreting Section 502 have uniformly held that to justify a work stoppage over unsafe conditions, the union must present ascertainable objective evidence that an abnormally hazardous condition did in fact exist: *NLRB v. Knight Morley Corporation,* 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958); *Philadelphia Marine Trade Association v. NLRB,* 330 F.2d 492 (3rd Cir. 1964), *cert. denied,* 379 U.S. 833, 841 (1964). Thus, in *NLRB v. Fruin-Colnon Construction Co.,* 330 F.2d 885 (8th Cir. 1964), it was held that a good faith belief that working conditions were abnormally dangerous is insufficient to establish that a strike was protected under Section 502 unless there was proof of physical facts to support that belief. "What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous' ": *Redwing Carriers, Inc.,* 130 NLRB 1208, 1209 (1961). To the same effect: *Stop & Shop, Inc.,* 161 NLRB 75 (1966).

Reasons for Granting the Writ.

The decision of the court below represents a clear departure from this previously uniform interpretation of Section 502 by its conclusion that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. As dissenting Judge Rosenn pointed out:

> "This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." (Appendix C, p. 22a)

Judge Rosenn's observation is borne out by the refusal of the court below to accept the results of investigations conducted by impartial federal and state agencies vested by statute with authority to make third-party determinations concerning mine safety. The federal mine inspector who inspected the mine on April 17 had the authority under Section 104(a) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §814(a), to issue a withdrawal order if he determined that an imminent danger[8] existed because of the presence of the foremen in the mine. He did not take this action. Similarly, the Commonwealth of Pennsylvania, after an impartial investigation, concluded that decertification proceedings were not appropriate and advised the parties that the company was at liberty to return the foremen to work. These facts were known to the Gateway miners before the strike, which originally

---

8. Section 3(j) of the Coal Mine Health and Safety Act, 30 U.S.C. §802(j), defines "imminent danger" to mean "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

started over a reporting pay dispute, was resumed on June 1.

Thus, the ruling of the court below makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court.

If there were any doubt that this is the necessary effect of the decision below, it has been dispelled by a very recent decision of the Court of Appeals for the Third Circuit in which the Court applied the *Gateway* decision in vacating a preliminary injunction against another wildcat safety strike. In *United States Steel Corporation v. United Mine Workers,* Nos. 71-1974/75 (3rd Cir. filed November 6, 1972),[9] the Court of Appeals said of its decision in *Gateway*:

> "The entire thrust of that decision was that it is the miners themselves who should make the determination as to what constitutes a safety decision."

This Court has never accepted for review a case which involved the interpretation of Section 502 or the relationship of this Section with Sections 301 and 203(d) of the Labor-Management Relations Act of 1947. The question of whether an objective or a subjective test is to be applied in determining if a work stoppage is entitled to protection under Section 502 is one of the

---

9. One member of the panel (Senior Judge Layton) concurred only because he felt bound by the majority opinion in *Gateway*. Otherwise he would have dissented for the reasons, among others, advanced by Judge Rosenn in the *Gateway case*. A petition for a writ of certiorari is being prepared and will shortly be filed in the *United States Steel Corporation* case.

utmost importance, which has not been, but should be, resolved by this Court.

Finally, the decision of the court below raises an additional question concerning the proper scope of Section 502. Although the foremen alleged to constitute the abnormally dangerous condition worked on the third shift, the protection of that Section was extended to strikers who worked on the first and second shifts and to those who were employed on the surface rather than underground in the mine. The degree to which the protection of Section 502 extends to employees not physically located at or near an alleged abnormally hazardous condition for work is a question which has not been, but should be, decided by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LEONARD L. SCHEINHOLTZ
HENRY J. WALLACE, JR.
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner,
Gateway Coal Company

Of Counsel:
DANIEL R. MINNICK

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff,
versus
UNITED MINEWORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINEWORKERS OF AMERICA; LOCAL NO. 6330, UNITED MINEWORKERS OF AMERICA; Defendants.

71-567

Order

And now, June the 18th, 1971, after consideration of the testimony taken this date in the within captioned proceeding, that is, the Gateway proceeding, which is 71-567, it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for work since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will

cause irreparable harm not only to the plaintiff but to the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there.

It appears that there is a labor dispute at the Gateway Mine of the three corporations already mentioned. It is apparent to the Court that the labor dispute involves two assistant mine foremen who are sufficiently identified in the testimony. It is apparent that the dispute concerns whether or not the employees of the company who belong to the local union already identified will work with the assistant mine foremen in question.

It is apparent that an impasse has existed and apparently has not been resolved. On the one hand, one of the witnesses for the union contends that the dispute was virtually settled, as far as he understood, by an agreement that the foremen or assistant foremen would be suspended until the state had taken care of the matter, and, in his mind, he believes that this referred to criminal proceedings, entirely separate and apart from these proceedings, which apparently are pending in the Greene County Court. On the other hand, management thought that this dispute would be settled by suspending the men only until a matter of decertification was determined by the officers of the State Department of Mines. Apparently, in his opinion, it was necessary only to wait for some indication from the state officials that the men would not be decertified.

This impasse has continued, apparently, in a situation where no one can move one way or the other.

It is apparent that the labor agreement is involved. We have made our own interpretation of the labor

agreement, as it is our duty to do, and we have thoroughly considered the labor agreement and all sections of it.

Accordingly, the following orders are made.

First, the employees of the Gateway Mine, their officers, and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:

(a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.

(b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issues stated forthwith and as soon as the hearing can be held, and neither party to this agreement — that is, the union agreement — shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.

(c) The decision of the umpire will be final and both parties will be bound by that decision.

It is the intention of the Court that this proceeding will not exceed 60 days.

Appendix A.

The mine will continue working, and the members of the union and all persons who are their officers or agents are enjoined from a work stoppage meanwhile. Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be retunred to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working.

The members of the Gateway Mine local are enjoined from encouraging or picketing or aiding or threatening the miners at the Vesta 4, Vesta 5, and Shannopin mines from working, pursuant to this order. As has already been stated, those mines are subject to separate orders.

This is a temporary restraining order, and it is issued upon condition that a bond shall be filed by the plaintiff in the sum of $6,500, on the condition that the plaintiff shall pay the defendant such damages as may be found due in the event it is found at a later time that the plaintiff was not entitled to this order.

This order shall continue until hearing to determine whether a preliminary injunction should issue.

At this time, the hearing is fixed for the 23rd day of June, at 2:00 o'clock p.m.

The United States Marshal is directed to serve copies of the temporary restraining order on the above-named defendants.

HON. BARRON P. MCCUNE
District Judge

Appendix B.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff vs. UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA, Defendants	Civil Action No. 71-567

Memorandum and Order

BARRON P. MCCUNE, District Judge
June 28th, 1971.

On June 18, 1971, this Court entered a temporary restraining order in the within captioned case after a hearing which began June 17, 1971, and ended June 18, 1971.

Following a hearing on June 23, 1971, to determine whether to grant a petition for a preliminary injunction the Court now determines that the preliminary injunction should be granted.

It is apparent from a study of the National Bituminous Coal Wage Agreement of 1968 that the issue in the instant case must be arbitrated and that the employees of the mine who are members of the United Mine Workers of America must work meanwhile.

On page 45 of the agreement under the heading *Miscellaneous* (paragraph 3) it is stated that the par-

ties to the agreement affirm that they will maintain the integrity of the agreement and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of the agreement.

On page 31 there is provided a scheduled means of settling all disputes ending with step five which is compulsory arbitration before an umpire selected by both parties whose decision shall be binding.

The defendant local union (No. 6330) contends that a dispute concerning safety is never arbitrated and cannot be arbitrated.

We disagree. Under the section of the agreement headed "Mine Safety Program" paragraph (e) (page 8) it is provided that a mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes that the conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special circumstances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. (It is not set forth who removes these people).

Grievances that may arise as a result of a request for removal of a member of the safety committee under

this section *shall be handled in accordance with the provisions providing for settlement of disputes* (Emphasis supplied).

The local union contends that a safety dispute exists. Assuming a safety dispute does exist it has resulted in an impasse to which there must be some solution other than an idle coal mine which employs hundreds of men (550 according to the testimony).

We conclude that an injunction should issue under the case of Boys Market Inc. v. Retail Clerks, 398 U.S. 235 (1970).

On or about April 16, 1971, three assistant mine foremen were accused by the union of making false notes in their logs concerning the state of ventilation in the mine. There had been a fall on an overcast in the mine about 4:00 A.M. on April 15, 1971, which required repair and which had resulted in an investigation into all phases of ventilation. When the morning shift reported for work on April 15, 1971, it was temporarily prevented from entering the mine by the Superintendent while he made certain that the mine was safe. By 11:00 A.M. on April 15, 1971, the mine was cleared for work and about 100 men (a partial force) entered and worked. The remainder had gone home. The mine worked the afternoon and night shift on the 15th. On the morning of the 16th, according to the management witnesses the local union committee said the men would not work unless reporting pay was given to the men who had not worked on the morning of April 15th. This was refused but arbitration of that issue was offered. The men did not work on Friday the 16th.

Appendix B.

The local union officers contend that the men did not work on the 16th because of the fear that the mine was unsafe. They were convinced that the assistant foremen in question had breached safety regulations by making false entries in their logs. On the 16th an investigation by the company ensued and on the 17th (Saturday) State and Federal Mine Inspectors were called in. On Sunday the 18th, the union resolved that the mine would not work unless the accused were suspended and the company suspended the men forthwith. The mine worked from 12:01 A.M., the 19th of April until 12:01 A.M., June 2, 1971, when the men stopped work again. The reason obviously was the reinstatement by management of the suspended men. Only two assistant foremen were now concerned, the third having meanwhile retired.

Meanwhile the men in question had been charged by a state mine inspector with a violation of the mining law but the Department of Mines had also written to management that it had no objection to reinstatement.

The general manager of the operation and the district president of the Union had talked about the men and how long they would remain suspended. The general manager contended there was no definite agreement but he thought he could reinstate them when the Department of Mines indicated they would not be decertified. He took the Department's letter as a green light.

The president of District 4 of the United Mine Workers testified that he considered that he had an agreement that the suspended men would not be reinstated pending the determination of the question by the

state. He thought that this meant a determination of the criminal charges. We cannot find that any agreement existed between these men because there was no meeting of the minds.

In any event when the assistant foremen returned to work the employees walked out. There was no formal procedure employed under the labor agreement in force, i.e., under the heading "Mine Safety Program."

It is apparent that the men contend that the mine is unsafe if the assistant foremen are in a supervisory capacity within the mine. It is apparent that management contends that this is an arbitrary position. In our view a grievance obviously exists which must be handled in accordance with the provisions of the agreement providing for the settlement of disputes.

Accordingly, we ordered the matter arbitrated.

It is also apparent that there will be no lack of safety meanwhile if the assistant foremen are not on the job. Therefore no reasons exists for the mine to remain idle.

It is implicit in the agreement that the men will work during the term of the agreement. Otherwise there is no rationale for a term during which the agreement will be observed.

Counsel for the United Mine Workers requests that District No. 4 be deleted from the order. We will refuse this request. District No. 4, as we understand it, is responsible for supervision of all locals within the district.

The company has requested that we permit the assistant foremen to return to work in a non supervisory

capacity pending the arbitration. We will refuse this request as well. In our opinion it would be very easy to create an argument that the men were in some way affecting the safety of the mine unless they were put to work as ordinary laborers. We dislike demoting them to non supervisory status. We have some regard for their prestige in the eyes of their fellow men and consider suspension pending arbitration a better result than a demotion pending arbitration.

We hesitate to open the door to another hearing on the question whether their return to work did in some way affect safety which justified an entire mine being called unsafe and unworkable.

We have reviewed the temporary restraining order and while it is brief and was dictated on the bench without much time for reflection we will convert it into a preliminary injunction without change.

Order

AND NOW, June 28, 1971, the temporary restraining order of June 18, 1971, filed in the within case shall now constitute a preliminary injunction without change until further order of this Court.

s/ BARRON P. MCCUNE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1641, 71-1642 and 71-1786

GATEWAY COAL COMPANY
v.
UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL 6330, UNITED MINE WORKERS OF AMERICA.

UNITED MINE WORKERS OF AMERICA,
Appellant in No. 71-1641

DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA,
Appellant in No. 71-1642

LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA,
Appellant in No. 71-1786

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYVLANIA

Argued February 7, 1972
Before KALODNER, HASTIE and M. ROSENN,
Circuit Judges

Appendix C.

Opinion of the Court

(Filed July 18, 1972)

HASTIE, *Circuit Judge.*

This is an appeal from an order, entered after hearing, that stated merely that a preceding temporary restraining order "shall now constitute a preliminary injunction without change until further order of this Court."

The underlying cause of controversy was the failure of three assistant foremen at a large underground coal mine to carry out certain prescribed mine safety procedures on a particular occasion and the consequent refusal of the miners to work so long as those supervisors should be employed. The miners also rejected a proposal to submit the matter to binding arbitration.

In its complaint the mine owner, Gateway Coal Co., invoked the jurisdiction of the district court under section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, and asked the court to order binding arbitration of the controversy and also to restrain the union from striking to enforce its demands for the removal of the foremen. In its temporary restraining order, later converted into a preliminary injunction, the court ordered that the dispute be submitted to an impartial umpire for binding decision, that the controversial mine foremen be suspended pending the umpire's decision and that the employees not strike to enforce their demands for the removal of these supervisors.

During the pendency of this appeal the impartial umpire rendered his decision in which he determined

that the assistant foremen should be permitted to return to work. Accordingly, two of those foremen have resumed their duties as supervisory employees responsible for mine safety procedures. Thus, in its present and continuing effect the injunction from which this appeal has been taken compels miners to accept an arbitrator's decision that their safety is not significantly jeopardized by risks inherent in working under certain foremen whose handling of safety procedures they distrust and prohibits them from refusing to work despite their own apprehension of danger.

In greater detail, the undisputed facts are these. On April 15, 1971, shortly after the daylight shift began work in the mine, it was discovered that the flow of air through a work area was 11,000 cubic feet per minute as contrasted with a normal 28,000 cubic feet. This increased the danger of the accumulation of dust and flammable gas and the risk of consequent explosion. Subsequent investigation disclosed a partial blockage of an intake airway. This was corrected promptly and normal air flow was restored.

On April 16 and 17, pursuant to a request by the union, federal and state inspectors visited the mine and investigated the circumstances of the April 15 incident and the adequacy of the consequent repair work. In the course of this investigation it was discovered that three assistant mine foremen, whose duty it was to check and record airflow before the daylight shift began work, had made false entries in their log books that failed to disclose the true air flow at the time in question.

On Sunday, April 18, some 200 Gateway employees attended a special union meeting and unanimously voted

not to work under the assistant foremen in question. The next day the foremen were suspended by management. Criminal proceedings also were instituted against them for falsifying mine records.

Late in May, the Pennsylvania Department of Mines notified Gateway that it did not object to the reinstatement of the suspended foremen, though criminal proceedings against them were still pending. On June 1, Gateway reinstated two of the foremen. The third had elected to retire.

When the foremen returned to work on June 1, the union employees left the job. This work stoppage continued while Gateway offered to arbitrate the dispute. The union refused to arbitrate. Gateway then filed the present suit and obtained the now challenged order that terminated the work stoppage and compelled arbitration of the dispute.

Subsequently the arbitrator found that the dispute was arbitrable, that the contention of the miners that the retention of the foremen with safety responsibilities would be dangerous was without merit and that the foreman should be allowed to perform their assigned tasks without interference.

There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction. Indeed, they pleaded *nol contendere* to a charge of criminal violation of safety requirements and were fined $200 each. And there had been a few earlier complaints concerning their handling of matters involving safety.

Appendix C.

The employer reasons that the present dispute was arbitrable under the terms of the collective bargaining agreement of the parties and, therefore, that a strike that repudiates the agreed settlement procedure and attempts to compel acceptance of the union's demands is an enjoinable violation of the labor contract, even in the absence of a no-strike agreement, as held by the Supreme Court in *Teamster Local 174 v. Lucas Flour Co.*, 1962, 369 U.S. 95.

The applicable National Bituminous Coal Wage Agreement of 1968 contains a section on "Settlement of Local and District Disputes." That section provides that "should any local trouble of any kind arise at the mine" an attempt shall be made to settle it by local negotiation and, if necessary, by a board composed of two representatives of the union and two representatives of management. Should these procedures fail, the dispute is to be referred to an impartial umpire and the "decision of the umpire shall be final." The mineowner relies upon this provision.

The union argues that this general section on local disputes was not intended to control employee response to or rejection of hazardous working conditions. It is pointed out that another part of the labor contract specifically provides that, regardless of the views or judgment of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous. And in this case a union membership meeting, the body superior of the mine safety committee, unanimously voted to stay out of the mine because of a particular hazard. Moreover, witnesses, both for the union and for the employer, testified at the hearing in

this case that they did not know of any case in which a disagreement on a safety matter had been handled through arbitration.

Thus, it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary.

We recognize that in interpreting and applying labor contracts there is a strong federal policy in favor of arbitration as a method of settling the ordinary type of labor disputes concerning wages, hours, seniority, vacations and other economic matters. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574; *Radio Corporation of America v. Association of Professional Engineering Personnel*, 3d Cir. 1961, 291 F.2d 105. However, a dispute concerning the safety of the place and circumstances in which employees are required to work is *sui generis*. The present case exemplifies the special and distinguishing character of safety disputes. Underground mining is a hazardous occupation at best. Necessarily, men who risk their lives daily in the course of this occupation are acutely concerned that every reasonable precaution be taken at all times to prevent a catastrophic accident. Any failure of responsible supervisors to perform their assigned duty to check air flow in a mine and to record and immediately report any significant diminution can cause the death of many men. In such circumstances, a single negligent failure to take a required safety precaution may reasonably be viewed as intolerable by those whose lives are at stake.

Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.

This view of public policy is strongly supported by specific legislation. Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, under which this suit was brought, and section 502 are *in pari materia,* both being part of the same chapter in the 1947 enactment. Section 301 gives the district courts jurisdiction over "suits for violation of [labor] contracts covered by "this chapter." In relevant part, section 502 provides: "nor shall the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work at . . . [their] place of employment . . . be deemed a strike under this chapter." 29 U.S.C. §143.

In applying section 502, this court has held that a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract. *Philadelphia Marine Trade Association v. N.L.R.B.,* 1964, 330 F.2d 492, *cert. denied* 379 U.S. 833 and 841. *Accord,*

Appendix C.

N.L.R.B. v. Knight Morley Corp., 6th Cir. 1957, 251 F.2d 753, *cert. denied*, 357 U.S. 927.

Actually, a duty to accept the procedure of binding arbitration and a duty not to strike are opposite sides of a single coin. Therefore, the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration.

For these reasons the present contract should not be construed as providing for compulsory arbitration of safety disputes.[1] Accordingly, in this case neither the miners' refusal to work nor their refusal to arbitrate the safety dispute was a violation of their labor contract. There was no wrong to enjoin. Yet, the preliminary injunction from which this appeal has been taken even now has the continuing effect of requiring the miners to accept the arbitrator's resolution of the safety dispute and to refrain from any work stoppage even if they still honestly believe that working under the controversal foremen subjects them to unacceptable

---

1. This conclusion makes it unnecessary to discuss *Boys Market, Inc. v. Retail Clerk's Union*, 1970, 398 U.S. 235, upon which appellee places great reliance. For that decision is grounded upon a finding that an economic dispute, not involving safety, was subject to compulsory arbitration under the employees' labor contract.

It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable.

danger. The miners should be relieved of this compulsion.

We have not overlooked an argument that the concept of a safety dispute and any special privilege or protection accorded employees in such a matter should be restricted to disputes concerning the physical conditions under which employees are required to work. However, we reject that suggested limitation. Careless or incompetent administration of important safety precautions can add as much to the hazards of dangerous employment as can the physical condition of the work place itself. And the normal concern of employees about danger from the one source is not essentially different from concern about the other. We are satisfied that any special freedom of action that should be accorded to employees in connection with safety disputes in general is fully applicable to the present controversy.

The judgment will be reversed and the cause remanded for a vacating of the preliminary injunction.

Appendix C.

ROSENN, *Circuit Judge,* dissenting.

I respectfully dissent.

Without attempting to analyze the motivations for the strike offered by the company, I believe that it is significant that the safety issue was not raised until after the union went on strike over the company's refusal to pay the men who failed to work on April 15th.

In addition, I have other serious reservations about the argument that the June continuance of the strike was because of the safety issue. If working with the two assistant foremen who were on the third shift was the genuine concern of the union, what explanation can be offered for the unilateral action of the union in calling off all men employed in the mine? Men were called off who were not working on the same shift with the two assistant foremen. Others who were employed on the surface also struck.

The union contended that the presence of the two assistant foremen in the mine constituted a safety hazard because they had committed isolated violations of mine safety regulations in the past. However, the record is to the contrary. First, the union had never complained about the alleged past violations, and the assistant foremen had continued in their jobs without objection from the union. Second, the union president was notified by the Pennsylvania Department of Environmental Resources, which exercises jurisdiction over coal mines, that:

> In view of the satisfactory record and good performance of these foreman (sic) in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal com-

> pany is at liberty to return the three (3) assistant foreman (sic) to work if it so desires.[1]

The only blot on their records was the April incident which the Commonwealth authorities did not believe warranted lifting of their licenses or precluding them from work. In view of the investigation conducted by the Commonwealth, its findings, which are expert and impartial, are of the utmost importance.

Whatever the probative weight of the evidence the union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration. Although it recognizes that in interpreting and applying labor contracts there is a strong federal policy in favor of arbitration, it considers "a dispute concerning the safety of the place and circumstances in which employees are required to work [as] *sui generis*." It would seem to conclude that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. Under this view, what criteria shall be used to measure union belief, especially when it concerns an assessment of the skill and integrity of a supervisory employee? I

---

1. The same letter to the union president concluded with the following statement:

> "The objectives of the mining laws of this State is (sic) to enhance and assure mine safety. The penalty language in the Bituminous Mining Law was meant to penalize violators of the mining law to the extent deemed appropriate by the judiciary. Other than the above noted action on the part of our District Inspector and the penalty imposed by the magistrate, we feel that sufficient action has been taken by the Commonwealth in this case."

believe that when a union raises Section 502 as a justification for a work stoppage, particularly in situations involving the subjective assessment we have here, the union must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists. See, e.g., *Philadelphia Marine Trade Association v. NLRB,* 330 F.2d 492 (3d Cir. 1964) (use of slings instead of pallets to unload ship); *NLRB v. Knight Morely Corp.,* 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958) (broken fan blower). Acceptance of anything less by a court would be an abdication of its judicial role.

But this result may be what the majority opinion portends. Its new test is that "[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .", they need not arbitrate. This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of "wildcatters." In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes.

Further, I believe the majority misapprehends the effect of Section 502 on the court's ability to compel

arbitration under a contract. The Supreme Court in *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) held that there is an obligation not to strike coterminous with the contract's arbitration clause even in the absence of a specific no-strike clause. The majority would now seem to read that decision to say that if a court cannot enjoin a strike, it cannot compel arbitration of the issue in spite of a broad arbitration agreement. I believe that such reasoning is unwarranted and undercuts the salutary principle of *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), which permits federal courts to order disputes covered by an appropriate provision to an arbitrator. Section 502 nowhere states or implies that safety issues are not appropriate for an arbitrator's decision. In fact, as I view it, the section requires a third party a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision.

It seems perfectly reasonable and logical that even if a court cannot order employees to return to work because of Section 502, it can still order the matter to arbitration if the contract so states. Such a result would properly harmonize the federal policies in favor of both worker protection and peaceful settlement of labor disputes.

Were it not for the majority's conclusion on this point, I believe the contract would compel the union to submit the safety question to arbitration. The Na-

tional Bituminous Coal Wage Agreement of 1968 contains a broad arbitration clause providing for final and binding arbitration, including as well ". . . differences . . . about matters not specifically mentioned in [said] agreement . . ." and ". . . any local trouble of any kind [arising] at the mine. . . ." This dispute fell squarely within the language of this arbitration clause and was not excluded from arbitration by any other provision of the agreement. *See, e.g., Blue Diamond Coal Co. v. United Mine Workers,* 436 F.2d 551 (6th Cir. 1970).

Finally, it is important to point out that the preliminary injunction avoided the Section 502 issue by specifically providing for the continued safety of the men in the mine. It forbade the foremen from returning to their jobs pending the resolution of the dispute. This protection was all the union could properly demand in light of the appropriate arbitration order.

Vacating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971. I would affirm the order of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1641/71-1642 and 71-1786

GATEWAY COAL COMPANY
vs.
UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4,
UNITED MINE WORKERS OF AMERICA;
LOCAL NO. 6330,
UNITED MINE WORKERS OF AMERICA

UNITED MINE WORKERS OF AMERICA, Appellant in No. 71-1641

DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA, Appellant in No. 71-1642

LOCAL UNION NO. 6330, Appellant in No. 71-1786
(D. C. Civil Action No. 71-567)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and ROSENN, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

said District Court, filed June 28, 1971, be, and the same is hereby reversed, and the cause remanded for a vacating of the preliminary injunction, with costs taxed in favor of appellants.

ATTEST:

. . . . . .

Clerk

July 18, 1972

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1641, 71-1642 and 71-1786

GATEWAY COAL COMPANY, *Appellee,*

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL 6330, UNITED MINE WORKERS OF AMERICA

UNITED MINE WORKERS OF AMERICA, *Appellant in No. 71-1641*

DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA, *Appellant in No. 71-1642*

LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA, *Appellant in No. 71-1786.*

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*; and KALODNER, HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, M. ROSENN, J. ROSEN and HUNTER, *Circuit Judges.*

The petition for rehearing filed by GATEWAY COAL COMPANY, *Appellee* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ FRANCIS L. VAN DUSEN
Circuit Judge

Dated: August 30, 1972

APPENDIX F

STATUTES INVOLVED

Section 203(d) (29 U.S.C. §173(d)) of the Labor-Management Relations Act of 1947 reads as follows:

> (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Appendix F.

Section 301(a) (29 U.S.C. §185(a)) of the Labor-Management Relations Act of 1947 reads as follows:

> (a) Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 502 (29 U.S.C. §143) of the Labor-Management Relations Act of 1947 reads as follows:

> Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

APPENDIX G

Umpire Decision and Award

LOCAL UNION NO. 6330, DISTRICT 4
UNITED MINE WORKERS OF AMERICA
vs
GATEWAY COAL COMPANY

This grievance case came on for hearing before the undersigned umpire at the Holiday Inn, Uniontown, Pennsylvania on Tuesday, August 10, 1971. The umpire was selected by the agreement of the parties in accordance with the Grievance Procedure of the Wage Agreement and as directed by orders of the United States District Court for the Western District of Pennsylvania.

A hearing was held in Federal Court and resulted in the court issuing a temporary restraining order on June 18, 1971. An additional order was entered by the court making the temporary restraining order a preliminary injunction. These Federal Court orders were filed in the record as exhibits in this case, Since the orders are necessary to a determination of this case, they are quoted as follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff,
— versus —
UNITED MINE WORKERS OF AMERICA:
DISTRICT NO. 4
UNITED MINE WORKERS OF AMERICA:
LOCAL NO. 6330
UNITED MINE WORKERS OF AMERICA.
Defendants.

Appendix G.

Order

And now, June the 18th, 1971, after consideration of the testimony taken this date in the within captioned proceeding, that is, the Gateway proceeding, which is 71-567, it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for wok since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will cause irreparable harm not only to the plaintiff but to the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there.

It appears that there is a labor dispute at the Gateway Mine of the three corporations already mentioned. It is apparent to the court that the labor dispute involves two assistant mine foremen who are sufficiently identified in the testimony. It is apparent that the dispute concerns whether or not the employees of the Company who belong to the local union already identified will work with the assistant mine foremen in question.

It is apparent that an impasse has existed and apparently has not been resolved. On the one hand, one of the witnesses for the union contends that the dispute was virtually settled, as far as he understood, by an agreement that the foremen or assistant foremen would be suspended until the state had taken care of the matter and, in his mind, he believes that this referred, to criminal proceedings, entirely separate and apart from these proceedings. which apparently are pending in the Greene County Court. On the other hand, management thought that this dispute would be settled by suspending the men only until a matter of decertification was determined by the officers of the State Department of Mines. Apparently, in his opinion, it was necessary only to wait for some indication from the state officials that the men would not be decertified.

This impasse has continued, apparently, in a situation where no one can move one way or the other.

It is apparent that the labor agreement is involved. We have made our own interpretation of the labor agreement, as it is our duty to do, and we have thoroughly considered the labor agreement and all sections of it.

Accordingly, the following orders are made.

First, the employees of the Gateway Mine, their officers and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:

Appendix G.

(a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.

(b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issue stated forthwith and as soon as the hearing can be held, and neither party to this agreement—that is, the union agreement—shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.

(c) The decision of the umpire will be final and both parties will be bound by that decision.

It is the intention of the Court that this proceeding will not exceed 60 days.

The mine will continue working, and the members of the union and all persons who are their officers or agents are enjoined from a work stoppage meanwhile. Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be returned to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working.

The members of the Gateway Mine local are enjoined from encouraging or picketing or aiding or threatening the miners at the Vesta 4, Vesta 5, and Shannopin mines from working, pursuant to this order. As has already been stated, those mines are subject to separate orders.

This is a temporary restraining order, and it is issued upon condition that a bond shall be filed by the plaintiff in the sum of $6,500, on the condition that the plaintiff shall pay the defendant such damages as may be found due in the event it is found at a later time that the plaintiff was not entitled to this order.

This order shall continue until hearing to determine whether a preliminary injunction should issue.

At this time, the hearing is fixed for the 23rd day of June, at 2:00 o'clock p.m.

The United States Marshal is directed to serve copies of this temporary restraining order on the above-named defendants.

HON. BARRON P. MCCUNE
District Judge

Appendix G.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff v. UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA. Defendants	Civil Action No. 71-567

Memorandum and Order

BARRON P. MCCUNE, District Judge
June 28th, 1971.

On June 18, 1971, this Court entered a temporary restraining order in the within captioned case after a hearing which began June 17, 1971, and ended June 18, 1971.

Following a hearing on June 23, 1971, to determine whether to grant a petition for a preliminary injunction the Court now determines that the preliminary injunction should be granted.

It is apparent from a study of the National Bituminous Coal Wage Agreement of 1968 that the issue in the instant case must be arbitrated that that the employees of the mine who are members of the United Mine Workers of America must work meanwhile.

On page 45 of the agreement under the heading *Miscellaneous* (Paragraph 3) it is stated that the par-

ties to the agreement affirm that they will maintain the integrity of the agreement and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of the agreement.

On page 31 there is provided a scheduled means of settling all disputes ending with step five which is compulsory arbitration before an umpire selected by both parties whose decision shall be binding.

The defendant local union (No. 6330) contends that a dispute concerning safety is never arbitrated and cannot be arbitrated.

We disagree. Under the section of the agreement headed "Mine Safety Program" paragraph (e) (Page 8) it is provided that a mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes that the conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special circumstances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committe e may be removed from the committee.

(It is not set forth who removes these people.)

Appendix G.

Grievances that may arise as a result of a request for removal of a member of the safety committee under this section *shall be handled in accordance with the provisions providing for settlement of disputes* (underlining supplied).

The local union contends that a safety dispute exists. Assuming a safety dispute does exist it has resulted in an impasse to which there must be some solution other than an idle coal mine which employes hundreds of men (550 according to the testimony).

We conclude that an injunction should issue under the case of Boys Market Inc. v. Retail Clerks, 398 U.S. 235 (1970).

On or about April 16, 1971, three assistant mine foremen were accused by the union of making false notes in their logs concerning the state of ventilation in the mine. There had been a fall on an overcast in the mine about 4:00 A.M. on April 15, 1971, which required repair and which had resulted in an investigation into all phases of ventilation. When the morning shift reported for work on April 15, 1971, it was temporarily prevented from entering the mine by the Superintendent while he made certain that the mine was safe. By 11:00 A.M. on April 15, 1971, the mine was cleared for work and about 100 men (a partial force) entered and worked. The remainder had gone home. The mine worked the afternoon and night shift on the 15th. On the morning of the 16th, according to the management witnesses the local union committee said the men would not work unless reporting pay was given to the men who had not worked on the morning of April 15th. This was refused but arbitration of that issue was offered. The men did not work on Friday the 16th.

The local union officers contend that the men did not work on the 16th because of the fear that the mine was unsafe. They were convinced that the assistant foremen in question had breached safety regulations by making false entries in their logs. On the 16th an investigation by the company ensued and on the 17th (Saturday) State and Federal Mine Inspectors were called in. On Sunday the 18th, the union resolved that the mine would not work unless the accused were suspended and the company suspended the men forthwith. The mine worked from 12:01 A.M., the 19th of April until 12:01 A.M., June 2, 1971, when the men stopped work again. The reason obviously was the reinstatement by management of the suspended men. Only two assistant foremen were now concerned, the third having meanwhile retired.

Meanwhile the men in question had been charged by a state mine inspector with a violation of the mining law but the Department of Mines had also written to management that it had no objection to reinstatement.

The general manager of the operation and the district president of the Union had talked about the men and how long they would remain suspended. The general manager contended there was no definite agreement but he thought he could reinstate them when the Department of Mines indicated they would not be decertified. He took the Department's letter as a green light.

The president of District 4 of the United Mine Workers testified that he considered that he had an agreement that the suspended men would not be rein-

stated pending the determination of the question by the state. He thought that this meant a determination of the question by the state. He thought that this meant a determination of the criminal charges. We cannot find that any agreement existxed between these men because there was no meeting of the minds.

In any - event when the assistant foreman returned to work the employees walked out. There was no formal procedure employed under the labor agreement in force, i.e., under the heading of "Mine Safety Program."

It is apparent that the men contend that the mine is unsafe if the assistant foremen are in a supervisory capacity within the mine. It is apparent that management contends that this is an arbitrary position. In our view a grievance obviously exists which must be handled in accordance with the provisions of the agreement providing for the settlement of disputes.

Accordingly, we ordered the matter arbitrated.

It is also apparent that there will be no lack of safety meanwhile if the assistant foremen are not on the job. Therefore no reasons exists for the mine to remain idle.

It is implicit in the agreement that the men will work during the term of the agreement. Otherwise there is no rationale for a term during which the agreement will be observed.

Counsel for the United Mine Workers requests that District 4 be deleted from the order. We will refuse this request. District No. 4, as we understand it, is responsible for supervision of all locals within the district.

The company has requested that we permit the assistant foreman to return to work in a nonsupervisory capacity pending the arbitration. We will refuse this request as well. In our opinion it would be very easy to create an argument that the men were in some way affecting the safety of the mine unless they were put to work as ordinary laborers. We dislike demoting them to non supervisory status. We have some regard for their prestige in the eyes of their fellow men and consider suspension pending arbitration a better result than a demotion pending arbitration.

We hesitate to open the door to another hearing on the question whether their return to work did in some way affect safety which justified an entire mine being called unsafe and unworkable.

We have reviewed the temporary restraining order and while it is brief and was dictated on the bench without much time for reflection we will convert it into a preliminary injunction without change.

Order

AND NOW, June 28, 1971, the temporary restraining order of June 18, 1971, filed in the within case shall now constitute a preliminary injunction without change until further order of this Court.

BARRON P. MCCUNE
United States District Judge

cc: LEONARD L. SCHEINHOLTZ, Esq.
HENRY J. WALLACE, JR., Esq.
DANIEL R. MINNICK, Esq.
LLOYD L. ENGLE, JR., Esq.
JOSEPH A. YABLONSKI, Esq.

Appendix G.

History

On April 15, 1971 at about 4:30 a.m. a roof fall broke an overcast in one of the intake air-ways of 5 face. This caused a reduction in the volume of air flowing to the No. 5 face. At about 7 a.m. a machine operator noticed that the coal dust wasn't moving away from the machine head in a normal manner which indicated some disruption in the flow of air. This was called to the attention of the Assistant Foreman, George Mosalovich, who took an air flow reading and discovered that the flow in his section had dropped to 11,000 cubic feet per minute. The normal flow measured at the start of the shift was about 28,000 cubic feet per minute.

Assistant Mine Foreman, Mosalovich reported the reduced air reading to the mine office and pulled the power in his section. Help was sent in to locate the problem. About 8 a.m. it was concluded that there was an obstruction or restriction in one of the main air courses. The power for the entire mine was cut and the day shift which had just entered the mine was ordered out. The broken overcast was discovered shortly afterward and was repaired. One of the members of the Safety Committee assisted in the repairs.

The Superintendent called both the federal and state mine inspectors to report the incident, but the evidence showed that neither of the inspectors felt it was necessary for them to come to the mine and make an immediate inspection. After the men had come back to work, one of the federal inspectors visited the mine but stayed on the surface.

During the company's preliminary investigation, it was noted that the state book appeared to be im-

properly filled out by three foremen being Mr. Mosalovich, Mr. Debreczeni, and Mr. Bartoshek. The company unilaterally suspended these three men pending a complete investigation by the coal company. The men returned to work on Monday April 19. In the meantime, State Mine Inspector, J. M. Hovanic, filed a criminal information against the three assistant mine foremen. At a magistrate's hearing several weeks later they were referred to a district attorney and on July 23, 1971 they pleaded "nolo contendere" and paid a $200 fine each.

Complaint as to these three assistant foremen was also filed with the State Mine Department by the three members of the Safety Committee of the local union which had the power to decertify these men as assistant foremen. If this had been done by the Mine Department, these men could have no longer worked as assistant foremen. In answer to this complaint filed by the local union, Mr. David R. Maneval, Acting Deputy Secretary, for the State Department of Environmental Resources, wrote a letter to Mr. Joe Kreon, President of Local Union No. 6330, United Mine Workers of America dated May 26, 1971 which is quoted as follows:

"This will acknowledge receipt of a copy of a letter dated April 30, 1971 signed by Thomas O'Brochta, John Ozonish and Frank Ruthreford of the Safety Committee of Local 6330, United Mine Workers of America.

This letter involves an incident at the Gateway Mine of the Gateway Coal Company. Mine Inspector J. M. Hovanic of the 8th Bituminous District had, of course, previously reported this incident to me and I had discussed it with Deputy Secretary Dennis Keenan. Due to the information

Appendix G.

I have obtained and open discussions concerning this matter with Assistant Attorney General, Peter J. Dubinsky, I concur that the action taken by Mr. Hovanic to file information with the District Magistrate against Mr. Debreczeni, Mr. Masolovich and Mr. Bartosheck.

In view of the satisfactory record and good performance of these foreman in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal company is at liberty to return the three (3) assistant foreman to work if it so desires.

The objectives of the mining laws of this State is to enhance and assure mine safety. The penalty language in the Bituminous Mining Law was meant to penalize violators of the mining law to the estent deemed appropriate by the Judiciary. Othe than n the above noted action on the part of our District Inspector and the penalty imposed by the magistrate, we feel that sufficient action has been taken by the Commonwealth in this case.

On of the three foreman, Mr. Bartosheck had been preparing to retire after 35 years service and did retire prior to May 31, 1971. On May 31, 1971, the other two foremen, Mr. Mosalovich and Mr. Debreczeni were returned to their jobs as assistant foremen; and at midnight that night, the members of Local Union 6330 went out on strike. The company then filed suit in Federal Court seeking a temporary restraining order and a temporary injunction requiring the men to go back to work which resulted in the issuance of the two orders quoted herein by Federal Judge Barron P. McCune.

Union Contention

It is the position of the Union that safety is not an arbitratal matter. In this particular case if the Safety Committee had shut down the mine the next recourse, if any, provided by the contract is that the company may base a grievance upon the fact that the Safety Committee has acted arbitrarily and capriciously. The Company can thereby request the removal of the Safety Committee or a member of the Safety Committee. This request would be handled under the Grievance Procedure of the contract. Although the Company has not made any charge against the Safety Committee, the Union states that it feels the only issue which can be arbitrated in this hearing is whether or not the Safety Committee acted arbitrarily and capriciously.

Company Contention

The Company's position in this case is that the work stoppage was an illegal or unauthorized work stoppage. Even with the obstruction of one of the air vents, that the air movement of the mine never fell below the state and federal requirements, That the men were taken out of the mine as an extraordinary precaution while the overcast was being repaired. The three assistant foremen all had good records; and while it is admitted that they made an erroneous entry in the book, they did not do anything to endanger the lives of any of the men.

Further, the State of Pennsylvania had the right to decertify these men as assistant foremen. Upon a complete investigation, they declined to decertify these men as they felt they had not done anything to justify

such action, that the fine they paid in the criminal procedure was ample punishment.

The Company sees the issue in this case as to whether or not the assistant foremen should be returned to work.

Safety

The Union's position in this hearing and also in federal court is that safety is not an arbitratal issue. This is partially true; but, like most general rules, there are exceptions as pointed out by Judge McCune in the preliminary injunction.

State and federal mine laws and regulations are administered by the proper state and federal agencies. These agencies are charged with the responsibility of making inspections. Under the relatively new Federal Safety Standards for Coal Mines, it is provided that an individual miner can report and request an inspection if he feels the safety regulations are being violated. This act further provides that the company cannot take any punitive action against the miner who reports an alleged violation and requests an inspection. Federal and state regulations as to safety require men who are trained in making these inspections and in the use of technical equipment and devices in making such investigations. Federal and state mine inspectors not only have the right to inspect and seek out violations but under the law also have the right to impose penalties and shut down a part or all of a mine if it deems necessary to the safety of the employees. An umpire has no such power. Therefore, the administration of the safety law and regulations is vested by law in the state and federal

mine departments and the enforcement thereof. These violations are not subject to arbitration.

There are matters respecting safety that are subject to arbitration. It has generally been held that if a miner is ordered to perform work at a place or with equipment that he can visibly ascertain as being so dangerous as to cause him serious injury or loss of life, he then has the right to refuse to carry out orders to perform such work. If the company undertakes to punish him, he can process a grievance through the Grievance Procedure of the contract.

Also, the contract contains provisions regarding the duties of the Safety Committee and any dispute involving this section of the contract is subject to arbitration, as specifically pointed out by Judge McCune. The first three paragraphs of the MINE SAFETY COMMITTEE provision state as follows:

> At each mine there shall be a mine safety committee selected by the local union. The committee members while engaged in the performance, shall be paid by the local union. When the mine safety committee is making an investigation of an explosion and/or a disaster, they shall be paid by the company at their regular rate of pay for the hours spent making such investigation, provided there is not a more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation law of the state where such duties are performed.

Appendix G.

The mine safety committee may inspect any mine development or equipment used in producing coal. It the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

The above quoted provision of the contract allows the Safety Committee to inspect the mine and equipment; and any conditions that would endanger the life and bodies of the mine workers can be reported by the Committee to management with recommendations for the elimination of the dangerous conditions. If the Company did not follow these recommendations, the committee could report the dangerous conditions to the state or federal mine officials and request action on their part. The section goes on to provide that where the committee believes an *immediate* danger exists, then the committee has the duty and the power to recommend management remove all mine workers from the unsafe

area. The operator is required to follow these recommendations. In this case, however, the danger must be immediate to the life and bodies of an employee or employees. In this provision, in order to protect the company from using these powers unjustly, it is provided that if it is found that the Safety Committee is acting arbitrarily and capriciously that such members may be removed from the committee. If the local does not remove them from the committee, a grievance can be filed by the Company and an umpire can require that the Safety Committee member or members be removed from the committee.

In the present case, the evidence does not show an immediate danger to the life or body of the miners existed. When the interruption of air became apparent, one section was closed down by the assistant mine foreman Mosalovich; but when the fan chart was brought to the attention of the Superintendent, all of the miners were pulled out of the mine by management as a safety precaution. At no time were the miners in immediate danger to their life or bodies as a result of this mishap in the air circulation system.

When the miners went out on strike in protest against the two assistant foremen, Mosalovich and Debreczeni, any part played by the Safety Committee in this strike was arbitrary and capricious on the part of the committee.

Assistant Foremen

The miners claim that they went out on strike because they were afraid to work under the direction of two assistant foremen, Mosalovich and Debreczeni. The acts of these two foremen were such that it de-

stroyed the confidence of the miners working under these foremen, and they felt that their life and bodies were in danger because these foremen were not qualified to safely fulfill their position as assistant foremen in the mine. It was shown and not denied that these assistant foremen had made an erroneous entry in the mine book regarding the flow of air after the fall in the overcast. A great deal of the evidence introduced by the Union was to the effect that 3 or 4 years ago, the men working under Mosalovich had made an illegal electrical splice generally referred to as a West Virginia splice. The West Virginia splice is the connecting together of cables by nailing the ends together on a board and leaving the live wires exposed. The umpire cannot seriously consider this evidence as this condition occurred 3 or 4 years before the fall in the overcast and they knew of the condition. In fact, they had a hearing in the union hall about the splice but continued to work with this man without objection for a period of 3 or 4 years. If the act of Mosalovich in allowing this splice was such that it would disqualify him as a foreman, the men would not have waited 3 or 4 years to be concerned.

The entry in the mine book was erroneous and admitted so by the two men, and it was a mistake on their part. The umpire is more concerned with their acts than with the erroneous entry in the mine book. Assistant Foreman Mosalovich was one of the first to discover that there was a reduction in the air in his section and he closed his section down, and he pulled the power at approximately 7:10 a.m. which showed good judgment on his part and that he was well aware of the precautions to be taken for the safety of himself and his men. When the fan chart was brought in to the Super-

intendent at about 8 a.m. or shortly after which showed a reduction or interruption in the air flow at 4:25 a.m., the Superintendent then ordered the entire mine closed and the men brought out of the mine. The necessary repairs were made and the mine was back in working operation again around 10:30 or 11 a.m.

The company introduced evidence that this was an exceptionally safe mine. The union's evidence tended to contradict the claimed safety conditions in the mine. Through all of the evidence, it appears that this mine was operated at an average or above average safety level. The evidence showed that although the men were brought out of the mine as a safety precaution, the air circulation never dropped below the state or federal minimum requirements and no danger of an explosion existed. There were methene gas indicators at various places in the mine, one being on the mining machine at the No. 5 face; and at no time did it ever indicate the presence of even over 1% of methene gas in the mine.

The evidence introduced by the company showed the two assistant foremen questioned showed that they had completed the proper studies, passed the examinations required to fulfill their positions, and, in addition, they had taken additional courses in maning and safety. The only charge brought against them was their mistake in making an erroneous entry in the mine book which they admitted was a mistake and the West Virginia splice had been made by the workers under Mosalovich 3 or 4 years previous to this occasion. "From the number of years these men had worked in the mines, it is unusual to find formen or miners who have not made more mistakes or errors in judgment than the ones accessed against these two men. The umpire feels that

the record of these two men is as good or better on the average of mine foremen in general. The employees of this mine did not have good cause to go out on strike and the strike was an unauthorized work stoppage.

The Pennsylvania State Department of Environmental Resources after an investigation refused to decertify the two foremen Mosalovich and Debreczeni. Although they had they had the power to do so if they felt such action was proper, they did not. In the letter stated above from the Acting Deputy Secretary, it was stated in view of the good performance of these men in the past that no further action should be taken against the foremen. A criminal information was filed against the foremen by a state mine inspector and they each paid a fine. The Pennsylvania Mine Department felt that this was sufficient punishment to the foremen to which the umpire agrees.

Under the MANAGEMENT OF MINES clause of the contract, it is stated: "The management of the mine, direction of the working force, and the right to hire and discharge are vested exclusively in the Operator . . ." To allow the employees by an unauthorized strike to cause management to fire two of the management employees would be taking away from management their most necessary and important right under the contract, and in effect to be allowing the employees to begin to take over the function of management of the mines. The two assistant foremen Mosalovich and Debreczeni are still certified, qualified assistant foremen, and management has the right to hire and use these men so long as they are qualified assistant foremen, under the laws of the State of Pennsylvania to fulfill the position of assistant foremen without interference from the employees.

Order

The umpire finds:

1. The Safety Committee acted arbitrarily and capriciously, Since the Company had not filed a complaint or asked that the men on the Safety Committee be removed, the Umpire cannot order their removal.

2. The position of the employees in refusing to work with the foremen Mosalovich and Debreczeni is unfounded. The Company is allowed to place these men back as assistant foremen without interference from the employees.

This September 2, 1971.

L. D. MAY
Umpire